No. 83-248

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

*Petitioner,*

—v.—

JAY EDWARDS, INC.,

*Respondent.*

## PETITIONER'S REPLY BRIEF

Steven Glickstein
Mark Platt

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

*Of Counsel*

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000

*Attorney for Petitioner
New England Toyota
Distributor, Inc.*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

**No. 83-248**

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,

*Petitioner,*

—v.—

JAY EDWARDS, INC.,

*Respondent.*

## PETITIONER'S REPLY BRIEF

NET respectfully submits this reply brief in support of its petition for a writ of certiorari.

### NET'S NEW-TRIAL MOTION WAS TIMELY

Edwards, in its responding brief, invents an erroneous procedural issue to divert the Court's attention from the question presented in NET's petition. It argues—incorrectly, and for the first time in this Court—that NET's motion for a new trial on damages was untimely.[1] By making this spurious procedural

---

1 This novel argument should have been raised in the court of appeals. NET had expressly appealed *both* from the final judgment of the district court *and* from the denial of NET's motion for a new trial, and any question as to the timeliness of the new-trial motion should have been addressed in that appeal.

argument the centerpiece of its brief, Edwards underscores the weakness of its position on the merits.

Edwards is dead wrong when it asserts that NET's new-trial motion "did not raise the issue of . . . damages awarded for the period prior to March 8, 1978." (Respondent's Br. at 5) NET's motion expressly sought a new trial on the issue of damages for the *entire* period claimed by Edwards—*not* just for the period after NET ceased to be Edwards' distributor, as Edwards asserts. Thus, NET's motion explicitly stated:

> "WHEREFORE, the defendant New England Toyota Distributor, Inc. respectfully requests the following:
>
> • • •
>
> 2.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item #1), this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint, with such new trial to be limited to the subject of damages." (Respondent's Br. at 12)

There is no dispute that this motion was filed on April 29, 1982, well within the 10 days required by Fed. R. Civ. P. 59(b).[2] NET's new-trial motion was unquestionably filed on time.

As Edwards acknowledges, the factual and legal grounds supporting NET's motion were amplified in NET's supporting memorandum. (Respondent's Br. at 5)[3] That memorandum was also timely filed pursuant to Local Rule 11(b) (2) of the District of New Hampshire, which provides:

> **Filing of Affidavits, etc.** Within ten days after the filing of a written objection, the party having the burden of going forward on the motion shall file all affidavits or other documents setting forth any necessary facts and, if

---

2 The judgment was entered on April 22, 1982.

3 The memorandum is reproduced in the appendix.

desired, a memorandum in support of his position, including citation of supporting authorities.

NET's memorandum—which devoted more than 11 pages to explaining the errors in Edwards' damage theory—was filed on May 13, 1982, within the prescribed 10-day period.[4] That being so, the memorandum was among the papers the district judge was required to consider, and it set forth arguments the district judge was required to weigh in deciding the motion.

There is no question, moreover, but that the district court did consider NET's memorandum (and the speculative-damages arguments it presented) to be properly before the court. In denying the motion, the district court stated that "[t]he Court has read and considered said motion together with Defendants' evidentiary material and *memorandum of Points and Authorities in support thereof.*" (Petition App. at 23a; emphasis added) It is therefore indisputable that the district court, in accordance with its local rules, considered NET's memorandum as an integral part of the timely new-trial motion, and properly considered the speculative-damages arguments raised in that memorandum.

## THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

Edwards further attempts to sidestep the question presented by suggesting that NET has misread the court of appeals' opinion. However, Edwards' own attempts to reframe the question demonstrate convincingly that NET's reading is correct. According to Edwards, the court of appeals held that since NET failed to "object to Edwards' exhibits and testimony at trial" and since it had the opportunity to present witnesses and to cross examine, "it [NET] cannot now be heard to claim there is insufficient evidence to support an adverse

---

4 Edwards filed its written objection to NET's new-trial motion on May 3, 1982.

result." (Respondent's Br. at 4-5) This is precisely the error in the court of appeals' opinion, however. By confusing the concepts of admissibility and weight, the court below allowed a damage award to stand which even it conceded "reflects annual profits proportionately *far greater* than Edwards ever made . . . ." (Petition App. at 5a; emphasis added)

Edwards' attempt to obfuscate the irreconcilability of the holding in *Springfield Crusher, Inc.* v. *Transcontinental Ins. Co.*, 372 F.2d 125 (3d Cir. 1967), with the holding below, by suggesting that the two cases "involve different factual circumstances", is unavailing. (Respondent's Br. at 7) There can be no question that under the newly announced First Circuit rule, the result in *Springfield* would have been different.

In *Springfield*, the Third Circuit ordered a new trial on damages because the jury verdict "was not reconcilable with the evidence." 372 F.2d at 126. It did so despite the fact that the jury properly had before it certain *unobjected-to* evidence which had been introduced by the plaintiff to support the award. *Id.* at 127. Under the First Circuit's new rule, the fact that the evidence was not objected to would terminate any further inquiry regarding the weight of the evidence and the verdict would have been upheld. The Third Circuit recognized, however, that the absence of an objection went only to the question of whether the evidence was properly admitted, and did not preclude a finding that the evidence was nonetheless of insufficient weight.

Edwards is equally off base in its attempt to distinguish *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *aff'g* 463 F. Supp. 983 (D. Conn. 1978), *cert. denied*, 455 U.S. 1016 (1982). Edwards blithely states that *SCM* is "not applicable" and that it provides nothing more than an "inept analogy" to the instant case. (Respondent's Br. at 8) These conclusory arguments cannot alter the fact that the *SCM* court reversed the jury award in favor of SCM, even though the damages had been based on evidence *introduced* by Xerox. Under the First Circuit's rule, the fact that Xerox introduced the damage exhibit would have precluded a later challenge by Xerox to the

legal sufficiency of the evidence. But, as Edwards itself acknowledges, the Second Circuit nonetheless rejected the verdict because it was "impossible in view of the uncontroverted testimony on sales." (Respondent's Br. at 8)

The damages claimed by Edwards in this case were equally impossible in view of the controverting figures contained in the *damage exhibit itself*, which showed that Edwards never even came close in real life to achieving the level of profitability it claimed in its damage theory. (*See* Petition at 7-8) Moreover, despite what Edwards contends, the court of appeals did not fail to appreciate the utter lack of integrity of Edwards' damage evidence. (*See* Petition at 4-6) As was pointed out above, the court of appeals stated that "[t]he [damage] award reflects annual profits proportionately *far greater* than Edwards ever made . . ." and added that "[w]ere we to write on a clean slate, we might find merit to NET's contentions," meaning that it would have reversed the award if an objection to the evidence had been made. (Petition App. at 5a; emphasis added)

The Second and Third Circuits have held that an objection at trial is not a precondition to the overturning of a speculative damage award. The First Circuit has held that a speculative damage award can stand if no objection to the damage evidence was made. It is hard to imagine a clearer conflict among the circuits.

## THE DECISION BELOW WILL RESULT IN A WASTE OF JUDICIAL RESOURCES

Edwards would have the Court believe that the decision in this case will affect no one other than the parties to this litigation. However, as we pointed out in our petition, the court of appeals' erroneous decision will have far reaching consequences. (Petition at 13) The First Circuit's new legal standard, which requires lawyers to object to evidence in order to challenge its weight on a new-trial motion, will inevitably

result in a great proliferation of frivolous objections at trial by attorneys who will be fearful of waiving their clients' rights to a new trial by failing to object. The resulting disruption of trial and wasteful expenditure of precious court time will only contribute to what has steadily emerged as a national crisis. In a time when all steps must be taken to streamline costly and time-consuming litigation, it cannot be seriously argued that a holding that is likely to encourage the waste of judicial resources is of concern only to the parties.

## CONCLUSION

For the reasons stated, a petition for a writ of certiorari should be issued to the United States Court of Appeals for the First Circuit.

Dated: October 5, 1983

Respectfully submitted,

Steven Glickstein
Mark Platt
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

ALLEN KEZSBOM
425 Park Avenue
New York, New York 10022
(212) 407-8000
*Attorney for Petitioner New England Toyota Distributor, Inc.*

# APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 78-49-D

JAY EDWARDS, INC.,

*Plaintiff,*

—v.—

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., et al.,

*Defendants.*

## DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT N.O.V. OR FOR A NEW TRIAL

Defendant New England Toyota Distributor, Inc. ("NET") submits this memorandum in support of its motion for judgment n.o.v. or, in the alternative, for a new trial or a remittitur.

## PRELIMINARY STATEMENT

The $1.4 million verdict against NET in this case represents a manifest miscarriage of justice, totally out of proportion to any alleged wrongdoing by NET or any conceivable injury sustained by the plaintiff, Jay Edwards, Inc. ("Edwards").

There was absolutely no evidence to sustain the major portion of the jury's damage award, namely, a purported misallocation of cars at a time when NET was not the distributor supplying cars to the plaintiff. In fact, there was no proof

whatsoever that the plaintiff received even one less car than it was supposed to after March 8, 1978, the date NET ceased to be distributor, or even one less car than the allegedly favored dealer. Edwards' damage theory was predicated on an assumption wholly without support. More than $900,000 of the $1.4 million verdict is attributable to this rank speculation. *See* Point I below.

In fact, the entire damage award—both for the period of NET's operation of the distributorship and thereafter—is fatally infected by gross mathematical errors, faulty logic and still other unsupported assumptions. One simple logical fallacy, for example, had the effect of doubling plaintiff's damages—a $700,000 mistake—because Edwards calculated damages based on reallocating to himself *all* of the cars at issue instead of reallocating them fifty:fifty with the favored dealer, who would have been entitled to his share equally along with Edwards. The jury's verdict on the issue of damages is plainly premised on impermissible speculation and guesswork, and must therefore be reversed. *See* Point I below.

Furthermore, Edwards has failed to demonstrate that NET was the proximate cause of any injury during the time when TMD was Edwards' distributor. *See* Point II below.

In addition, the Court made numerous errors in its evidentiary rulings. The most significant of these rulings: (1) improperly excluded evidence from trial which proved that NET did not tamper with plaintiff's allocation; (2) erroneously admitted hearsay evidence concerning a conversation that plaintiff purportedly had with an unidentified TMD employee; and (3) prejudicially admitted highly inflammatory evidence concerning the warranty fraud conviction of Gordon Butler, brother of NET chairman George Butler, which evidence had absolutely no relevance to any issue in this case, and which could only have prejudiced the jury against the defendant. *See* Point III below.

Finally, evidence which was excluded by this Court at trial, as well as newly discovered mathematical evidence, conclusively demonstrates that plaintiff was allocated vehicles strictly on the basis of the same mathematical formula applicable to all

dealers, and that there was no deviation. This evidence unequivocally proves that plaintiff was not shorted even a single car, and that NET meticulously complied with its obligation to deal with the plaintiff in good faith. *See* Point IV below.

## FACTS AND PRIOR PROCEEDINGS

Plaintiff Jay Edwards, Inc. ("Edwards") is a Toyota dealer in Portsmouth, New Hampshire. Defendant NET was the distributor of Toyota vehicles to New England dealers (including Edwards) until March 8, 1978, when NET's distributorship was terminated by the national importer, Toyota Motor Sales, U.S.A., Inc. ("TMS"). TMS replaced NET with TMS' own subsidiary, Toyota Motor Distributors ("TMD"). It is undisputed that TMD, and not NET, was solely responsible for supplying Edwards with cars after March 8, 1978.

In this action, Edwards claims that NET gave preference to a nearby Toyota dealer in the allocation of vehicles. Edwards alleges that the nearby dealer, Bill Dube, Inc. ("Dube"), wrongfully received more cars than Edwards. Edwards claimed that NET improperly allotted more cars to Dube in retaliation for Edwards' activities, in violation of the good faith provisions of New Hampshire RSA ch. 357-C. NET, on the other hand, insisted that Edwards received the precise number of vehicles to which it was entitled, according to a mathematical formula applicable to all dealers, and that Edwards' lower allocation was attributable to Dube's superior performance. Edwards predicated his damage theory on the hypothesis that, but for NET's allegedly unlawful acts, Edwards would have received the same number of cars as Dube.

After trial, the jury awarded Edwards $1,419,462, the precise amount demanded by the plaintiff in its damage theory. Of this amount, $470,024 in alleged damages was attributable to the time period prior to March 8, 1978 when NET was distributor. The remainder, or $949,438, was attributable to the period from March 8, 1978 until March 31, 1981, when TMD was Edwards' exclusive distributor. At trial, the Court admitted, over NET's objection, "evidence" relating to the post-

NET period. At the close of plaintiff's case, NET moved to strike all testimony and exhibits relating to damages allegedly incurred subsequent to March 8, 1978. The motion was denied.

Judgment was entered on the jury's verdict on April 22, 1982, and NET filed a timely post-trial motion to set aside the jury's verdicts.

## POINT I

## PLAINTIFF'S ENTIRE DAMAGE THEORY IS BASED UPON RAMPANT SPECULATION AND GUESSWORK WHICH IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE JURY'S VERDICT

It is black letter law that plaintiff must "prove lost profits with reasonable or fair certainty." *Cecil Corley Motor Company, Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 854 (M.D. Tenn. 1974); *Siegfried* v. *Kansas City Star Co.*, 298 F.2d 1 (8th Cir. 1962), *cert. denied*, 369 U.S. 819 (1962); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). Such proof must be "sufficient to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts," *Cargill, Inc.* v. *Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1945); *Cordeco Development Corp.* v. *Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978 (1976); *Robie* v. *Ofgant*, 306 F.2d 656 (1st Cir. 1962); and must provide a "rational basis," *Herman Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 910 (2d Cir. 1962), *cert. denied*, 369 U.S. 865 (1962), from which a "just and reasonable inference and estimate [of the damages] can reasonably be drawn." *National Wrestling Alliance* v. *Myers*, 325 F.2d 768, 777 (8th Cir. 1963); *Cargill, Inc.* v. *Taylor Towing Service, Inc., supra*; *Christiansen* v. *Mechanical Contractors Bid Depository*, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966). This is because "the purpose of a damage award is to compensate the

injured party for loss resulting from the conduct of the wrongdoer, 'not to penalize the wrongdoer or to allow plaintiff to recover a windfall.' " *Cordeco Development Corp.* v. *Santiago*, 539 F.2d at 262; *Robie* v. *Ofgant*, 306 F.2d at 660; *Burke* v. *Burnham*, 84 A.2d 918 (N.H. 1951). Thus, courts have established these strict requirements in order to prevent plaintiffs from recovering amounts in excess of their real damages, predicated on irrational and illogical arguments and computations.

Thus, for example, in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d at 391, the court rejected a plaintiff's attempt to measure his damages in one product line by reference to his performance in another product line absent a showing that performance in one product was actually indicative of performance in the other. The *assumption*, which plaintiff relied on, that the two products moved in tandem, could not be the basis for a damage award without proof that the assumption had validity. Similarly, in *David R. McGeorge Car Co.* v. *Leyland Motor Sales, Inc.*, 504 F.2d 52, 59 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975), the court set aside a damage award in an automobile misallocation case where the plaintiff's damage theory awarded the plaintiff *all* of the allegedly misallocated cars. The Fourth Circuit recognized that plaintiff's theory proceeded upon a logical fallacy in that plaintiff had excluded both (1) his real world allocation from the total and (2) failed to recognize that three other dealers involved were entitled to their proportionate share of the vehicles received in total by all four.

In short, in case after case, the courts have recognized that a plaintiff may not recover damages unless his theory of recovery makes logical sense, is a valid measurement of the impact of the injury claimed, and relies on assumptions which are borne out by the evidence. Here, plaintiff's theory cannot meet this test.

*A. There Is No Evidence To Support Plaintiff's Assumption That Dube Was Offered More Cars Than Edwards After March 8, 1978*

Edwards' theory in this case was that NET discriminated in its allocation of cars against Edwards and in favor of Dube. The theory hypothesizes that but for NET's alleged misallocations, Edwards would have received the exact same number of cars as Dube. The evidence revealed that NET offered Dube 214 more cars than Edwards in 1976, so that Edwards' damage analysis presumed that it should have been offered 214 more cars. Similarly, the evidence revealed that NET offered Dube 313 more cars than Edwards in 1977, so that Edwards' damage analysis presumed that it should have been allocated 313 more cars. This provided the analysis for 1976 and 1977, when NET was the distributor.

As to the subsequent period, *i.e.*, after March 8, 1978, there was absolutely *no* evidence relating to Dube's allocation of cars. And that means that there is nothing whatever in the record to show that Edwards was allocated fewer cars than Dube subsequent to March 8, 1978. For all we know, TMD offered Edwards an equal number or even more cars than Dube. *It is simply impossible to award damages based upon Edwards' alleged shortage of cars relative to Dube, when there is not a scintilla of evidence that after NET ceased being distributor, Edwards' allocation was in fact lower than Dube's.*

Nothing prevented Edwards from introducing evidence as to what Dube was allocated by TMD.* He did not do so, however. Instead, Edwards pulled a mathematical sleight of hand which obviously fooled the jury. Instead of presenting evidence that Edwards was in fact allocated fewer cars than Dube, Edwards' accountant simply *presumed*—without any proof—that TMD offered 300 fewers cars to Edwards in 1978,

---

* Both TMD and Dube were within the subpoena power of the court and Dube, in fact, was a trial witness.

1979, 1980 and 1981 than TMD offered to Dube.* What is the basis for this assumption that TMD allocated Dube 300 more cars a year than Edwards? The only "basis" proffered is that NET, on average, allocated 300 more cars a year to Dube than to Edwards prior to the time TMD became distributor. This so-called "basis" does no more than restate the assumption that TMD allocated to Dube and Edwards in the same proportion as NET. It does not constitute evidence that TMD, in fact, allocated more cars to Dube than to Edwards.

The courts have repeatedly rejected damage theories which, like in Edwards', make unsupported assumptions about one time period based on performance or activities in another or about one line of business based on another. In *William Inglis & Sons Baking Co.* v. *ITT Continental Bakery Co.*, 461 F. Supp. 410 (N.D. Cal. 1978), *aff'd in part and rev'd in part*, 652 F.2d 917 (9th Cir. 1981), the court struck down a damage claim that relied on "profit experience" between 1960 and 1964 as a "base period for projecting lost profits" in later years. The court explained that the analysis was invalid for the "comparability of the base and later period had not been established."

The 9th Circuit made the same point in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke and Liquors, Ltd.*, when it rejected an attempt to extrapolate the plaintiff's performance in one business as a basis for computing damages in a different business in which the plaintiff was also engaged. The Appeals Court cautioned against the use of " 'an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it.' " (416 F.2d at 87, quoting *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir. 1962).

Here, there was not a scintilla of evidence that Dube received more cars from TMD than did Edwards, which is the fundamental premise of Edwards' damage claim. Certainly, Edwards

---

* The 300 figure is an annual figure. The actual number used for 1981 was 75, which represents a quarter-year's total and reflects the fact that damages were only claimed through March 31, 1981.

would not have sustained any injury and could not recover any damages for the time TMD was distributor if, subsequent to March 8, 1978, Edwards in reality was offered *more* cars than Dube. Since plaintiff introduced no evidence proving that it received less than Dube after March 8, 1978, its claim that it was entitled to 300 more cars a year is pure speculation without any foundation in the record. The Court must, therefore, grant judgment n.o.v. with respect to the $949,438 in damages awarded by the jury for that time period.

*B. There Is A Logical Fallacy In Edwards' Assumption That It Would Receive A Constant Number Of Additional Cars In The Face Of A Sales Decline*

Not only did Edwards fail to support his assumption that he received fewer cars from TMD (NET's successor as distributor) than Dube, but he also failed to justify his further assumption that the discrimination was properly measured as a constant 300 cars per year for each of the years 1978, 1979, 1980 and 1981.

According to Edwards' own records introduced at trial, Edwards' real world sales actually declined from 382 in 1977 (NET's last year) to 357 in 1978 (TMD's first year) to 310 vehicles in 1979 (TMD's second year)—despite an increased supply of Toyotas to the New England area as a whole. If TMD adopted the same formula as NET, one would expect Edwards to receive the same overall percentage of vehicles in 1978 and 1979 as he did in 1977, which would mean an *increase* rather than a decline in sales. The fact that Edwards' sales declined in absolute numbers can only mean one of two things. Either TMD allocated to Edwards on a *lower* percentage basis than did NET (in which case NET could not possibly be responsible) or Edwards' sales performance simply decreased (in which case the decline is attributable to Edwards and not NET). In no event does Edwards explain why he is entitled to the same 300 extra cars in 1978, when he sold 382 cars in actuality, as in 1980, when he was able to sell only 310. Since a dealer's allocation is supposed to reflect his sales performance, Edwards' damage theory is invalid since it plainly fails to do so.

In *Cordeco Development Corp.* v. *Santiago Vasquez*, 539 F.2d at 262, the court recognized that there must be a "clear basis for *calculating the extent*" (emphasis added) of the impact of the alleged unlawful conduct. Here, Edwards has provided no basis for the conclusion that the alleged misallocation amounted to the same 300 cars a year in each of the years 1978-1981, particularly in the face of evidence from Edwards' own records that his sales performance over the period was in decline.

### C. *Edwards' Damage Theory Is Irrational And Contains An Impermissible Double-Count*

There is still a further logical fallacy in Edwards' damage theory, and this fallacy exists with respect to Edwards' damage claim covering the period when NET *was* the distributor as well as the subsequent period.

Edwards' accountant has made a fundamental error in logic which has had the effect of doubling Edwards' damages—a $709,731 mistake.* Edwards' damage theory assumes that, beginning in April 1976, Edwards and Dube should have been offered an identical number of cars. In April 1976, for example, Dube was allocated 70 cars while Edwards was allocated 28. Edwards' damage theory presumes that it should have been offered 70 cars just like Dube, and computes damages based on that premise.

The fundamental error in Edwards' computation can be illustrated in the following chart.

| | *Allocation* | *Assumed Allocation Under Edwards' Damage Theory* | *Correct Computation* |
|---|---|---|---|
| Dube | 70 | 70 | 49 |
| Edwards | 28 | 70 | 49 |
| TOTAL | 98 | 140 | 98 |

* Of the total $709,731 error, $235,012 is attributable to the period before March 8, 1978 and $474,719 is attributable to the subsequent period.

As can be seem from the above chart, NET had a total of 98 cars to allocate as between Edwards and Dube. If the 98 cars were divided equally between the two, each would receive a total of 49 cars. Edwards' total would increase by 21 cars and Dube's total would be reduced by 21 cars, leaving the same 98 cars with which we started. Edwards' damage calculation, however, creates an additional 42 cars out of thin air. This is accomplished by raising Edwards' total by 42 without reducing Dube's allocation by a single car. The result is that damages are predicated on the basis of 140 vehicles when in fact only 98 vehicles existed. Obviously, if Dube's and Edwards' allocations are to be equalized, it must be done on the basis of the 98 cars which existed in the real world, and not on the basis of the 42 extra fictitious cars.

The practical effect of this error is to exactly double plaintiff's alleged damages. In our example, for instance, Edwards computed damages on the basis of 42 extra cars being made available to him. In fact, if Dube and Edwards were equalized in the real world, Edwards would have had only 21 (half of 42) additional vehicles.

This is precisely the logical fallacy which caused the court to throw out the damage theory in *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974). There, the plaintiff dealer, alleging misallocations in the supply of Triumphs, claimed he was "shorted" 52 cars in 1970. Plaintiff's expert introduced into evidence a damage theory which developed the 52 car projection by (1) asserting that McGeorge's 1967-1968 sales amounted to 87 percent of the combined total of cars sold by the three allegedly favored dealers; (2) applying this percentage to the units supplied to the three favored dealers in 1970; and (3) subtracting the 31 cars McGeorge actually received in 1970 from that total. On appeal, the 4th Circuit recognized that plaintiff's theory did not measure the "misallocation". This could only be done by determining the plaintiff's percentage of the aggregate of the cars received by all four dealers and dividing that aggregate among them, after which plaintiff's actual "shortage" was only 28 cars. So, too, here, by simply taking for himself the

total difference between his and Dube's allocation, Edwards has not measured the misallocation but is becoming the improperly favored dealer himself.

*D. Edwards' Damage Theory Conflicts With Edwards' Performance In The Real World And Is Therefore Irrational*

Edwards' damage theory conflicts with Edwards' actual profit performance in the real world and therefore is without a rational basis. The following chart illustrates the glaring error in Edwards' damage calculation:

| | *Number of Cars* | *Net Profit* |
|---|---|---|
| 1976 Actual | 183 | $ 28,242 |
| 1977 Actual | 382 | $ 86,912 |
| 1976 Projected | 354 | $203,867 |

In 1976, Edwards received 183 cars during the nine-month damage-period and earned a net profit of $28,242, according to the damage exhibit. Under plaintiff's theory, Edwards should have received 354 cars; and Edwards projects a profit of $203,867 on those 354 cars. In the real world, Edwards did receive 382 cars in 1977 or 28 more cars than the 1976 projection. Far from making a $203,000 profit, however, Edwards' real world profit was at most $86,000 (according to Edwards' financial statements), and probably only $35,000 (according to Edwards' tax return). There is no basis for a jury awarding damages to Edwards on the presumption that Edwards could have earned $203,000 on 354 cars when in the real world Edwards earned only $86,000 (or $35,000 per his tax return) on 382 cars in 1977.

Edwards' real life profits in 1978 ($56,385 on 357 cars) and 1979 (only $2,583 on 310 cars) further prove the ridiculousness of Edwards' profit assumptions.*

---

* The real life profit totals according to Edwards' tax returns are even lower. They show a $39,687 profit on 357 cars in 1978 and a $1,492 loss on 310 cars in 1979.

The reason why Edwards' damage theory is so plainly belied by his real world experience is that Edwards' damage theory fails to account for increasing variable expenses and erroneously assumes that revenue from parts, service and used car sales goes up in direct proportion to increases in new car sales. In fact, Edwards' own financial statements show that parts, service and used car sales do *not* increase in such a manner and that variable expenses increase more than Edwards' accountant presumed in the damage theory.

Similarly, in deriving his gross profit amount per unit of new car, Edwards failed to take account of the fact that the total number of cars available for allocation includes less desirable cars along with more desirable ones. Less desirable cars, by definition, produce less profit, take longer to sell, and produce higher carrying costs. In the real world, Edwards turned down the less desirable cars, which is reflected in a higher gross profit per unit. If his allocation of vehicles were to increase materially in accordance with his damage theory, (*e.g.*, from 382 to 649), he would necessarily have a much higher number of undesirable cars and a lower unit gross profit. It is irrational to blithely assume, as Edwards does, that the same per unit gross profit would hold for the undesirable cars as he claims he achieved in the real world on the more desirable cars.

The facts in this case are strikingly similar to those in *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974), where the court granted a judgment n.o.v. to the defendant, General Motors, on a misallocation claim by a Pontiac dealer. The court criticized plaintiff's attempt to prove lost profits based on a variable net profit figure which did not account for additional expenses generated by increased sales volume. The court also noted that contrary to plaintiff's contention, such additional expenses would not be offset by increased profits generated by the parts and service departments. Furthermore, the court questioned plaintiff's "lost sales" estimates which were based on unsupported assumptions regarding the manner in which cars should have been allocated to plaintiff and its competitors. Also, the court found that there was "absolutely no proof that plaintiff or-

dered Pontiacs in quantities sufficient to justify distribution to it in the amounts suggested" by its witnesses, thus making it "impossible for plaintiff to have been damaged in the amounts suggested by those witnesses." (*Id.* at 858). The Court's conclusion that the plaintiff's damage theory amounted to "wild, unsupported and unfounded speculation" (*Id.* at 858) is equally applicable here.

* * *

There can be no serious dispute here that plaintiff's elaborate damage calculations serve only to mask the flimsy factual basis on which those calculations rest. As we have shown, Edwards' damage calculation is fraught with unsupported factual premises, baseless assumptions, and faulty logic, each of which, standing alone, would warrant overturning the jury's verdict. This is true for the period while NET was still distributor and for the period when TMD was distributor.

The fact that the jury accepted this irrational and erroneous theory in full, without even a dollar's discount, demonstrates the wisdom of the admonition in *Schwabe* and *Seagram* that the courts must guard against "an array of figures conveying a delusive impression of exactness in an area where the jury's common sense is less available than usual to protect it."

### *E. Edwards Failed To Meet Its Obligation To Present The Best Available Evidence On Damages*

Plaintiff has also failed to prove its claim with the best available evidence. Actual statistics were available to the plaintiff regarding the number of cars Dube was allocated in 1978 and beyond. Edwards' counsel had ample opportunity to take discovery of TMD but did not do so. Moreover, TMD is located in Mansfield, Massachusetts, within the subpoena power of the Court (being less than 100 miles from Concord), so that the actual comparison of Dube's and Edwards' allocations subsequent to March 8, 1978 could have been obtained. And, of course, Dube was called as a witness but evidence of his allocations was not developed by plaintiff at trial or during discovery.

In *Cecil Corley Motor Co.* v. *General Motors Corp.*, *supra*, the court included among its reasons for granting a new trial the fact that "plaintiff had in its possession the means with which to calculate, with reasonable certainty, a net profit figure as to Pontiac automobiles, [yet] chose instead to go to the jury with less than the best available evidence on damages." 380 F. Supp. at 858-59. Similarly, in *Harrison* v. *Prather*, 435 F.2d 1168, 1174 (5th Cir. 1970), the court observed that Mississippi law "does hold that the most accurate and reliable evidence available should be required to prove anticipated profits." Similarly, in *Bitler* v. *Terri Lee, Inc.*, 81 N.W.2d 318, 329-330 (Neb. 1957), the court stated:

> ". . . The law requires the best evidence available. A claimant of substantial damages must, to prevail, furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty and exactness if the evidence of damages or the amount thereof are susceptible of definite proof. They may not be established by conjecture, speculation, or doubtful proof."

*Accord*, *Sylvania Electric Products* v. *Flanagan*, 352 F.2d 1005 (1st Cir. 1965), *cert. denied*, 404 U.S. 829 (1971); *Hargis* v. *Sample*, 306 S.W.2d 564 (Mo. 1957). Thus, plaintiff here should not be permitted to speculate as to lost profits when accurate factual evidence was available.

## POINT II

## THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A JURY FINDING THAT NET PROXIMATELY CAUSED INJURY TO EDWARDS DURING THE TIME TMD WAS EDWARDS' DISTRIBUTOR

We argued in Point I above that plaintiff's damage theory is undermined by the fact that there is not a shred of evidence in the record that Dube received a single car more than Edwards during the period when TMD was the distributor. We also demonstrated that the lack of any evidence that Edwards received fewer cars during that period than his proper alloca-

tion called for, similarly rendered his damage theory speculative. Both of these facts also demonstrate why it cannot be concluded that NET's actions prior to March 8, 1978 caused injury to Edwards *after* NET ceased to be the distributor. There is no evidence that Edwards was injured at all during that period.

But even if it be assumed—erroneously—that Edwards received fewer cars than Dube during the post-March 1978 period and that it was entitled to receive more, that would hardly establish that it was NET's fault that it did not receive its proper allocation *from TMD*.

*A. There Is Insufficient Evidence To Support Plaintiff's Assumption That TMD Adopted The Same Allocation System As NET, Or That TMD Based Its Allocations To Dube And Edwards Upon NET's Allocations To Those Dealers*

A fundamental premise of Edwards' claim of injury subsequent to March 8, 1978 is that TMD adopted the same allocation system as NET, and that TMD based its allocations to Dube and Edwards on the basis of NET's allocations to those dealers. But once again, there is a failure of proof.

To be sure, Jay Edwards did attempt to satisfy this burden by testifying to a purported conversation he had with an unidentified TMD employee. The totality of Mr. Edwards' testimony on this issue, which took no more than five minutes of trial time, was that Edwards asked this unidentified TMD employee to change his allocation because of alleged irregularities during the NET period and that the unidentified employee refused, purportedly because a change would offend other dealers. This evidence cannot possibly support the jury's damage award.

Most fundamentally, the statement by the unidentified TMD employee takes Edwards nowhere, even if true. The employee merely stated that he would not give Edwards more cars because that would offend other dealers. The employee did *not* say that TMD used the same formula as NET, or that TMD's

allocation to Edwards was based on NET's allocation to Edwards, or that Edwards was getting fewer cars than he was entitled to. That was Edwards' speculation but it was not confirmed by the employee.

Moreover, Mr. Edwards' testimony concerning this alleged conversation is rank inadmissable hearsay.* What is more, the testimony was made in circumstances which were particularly unreliable. First, the declarant was not even identified. Second, the declarant had a motive to be less than candid with Mr. Edwards, since TMD itself was being accused of misallocating vehicles. (There would be a strong incentive to blame it all on NET, if for no other reason than to get Edwards off TMD's back.) Third, Edwards, as an interested party, has a clear incentive to stretch or distort whatever was told to him. Fourth, the declarant, whose name is known only to Mr. Edwards, is within the subpoena power of the Court—presuming he is still a TMD employee—and yet he was not called by Edwards as a witness. It is preposterous to predicate a $950,000 damage award (for the post-March 1978 period) on this single hearsay statement by an unidentified person made in circumstances which are inherently unreliable.

Furthermore, there is substantial evidence that TMD did not use the same allocation formula as NET. Edwards' sales actually declined from 382 in 1977 (NET's last year) to 357 in 1978 (TMD's first year) to 310 vehicles in 1979 (TMD's second year)—despite an increased supply of Toyotas to the New England area as a whole. If TMD adopted the same formula as NET, one would expect Edwards to have received the same overall percentage of vehicles in 1978 and 1979 as he did in 1977. As discussed in Point I, the fact that Edwards' sales declined in absolute numbers can only mean one of two things. Either TMD allocated to Edwards on a *lower* percentage basis than did NET (in which case NET could not possibly be responsible) or Edwards' sales performance simply decreased

---

* That is, it is an out-of-court statement (by the unidentified employee) being offered to prove the truth of the matter asserted (that TMD did not deviate from NET's formula).

(in which case the decline is attributable to Edwards and not NET).

### *B. As A Matter Of Law, NET Cannot Be Responsible For TMD's Intentional Misallocations To Edwards*

Mr. Edwards' testimony and the documentary evidence both make it crystal clear that TMD was well aware of Edwards' claim of misallocation during the NET period. Edwards' claim is that TMD, with full knowledge of this error, nonetheless continued to misallocate cars in favor of Dube and against Edwards. If there were evidence—and there is not—that Dube continued to receive more cars than Edwards after TMD took over *and* that TMD refused to alter NET's allocation system, that would spell an intentional tort by *TMD*. NET could not be legally responsible for TMD's intentional tort against Edwards.

Indeed, the New Hampshire statute pursuant to which this case was tried expressly bars a claim for misallocation if the misallocation is "due to a cause over which the manufacturer, distributor, or wholesaler, or any agent thereof, shall have no control." R.S.A. 357-B:4 (III)(a) (1979 Supp.). Here, NET inarguably did not have control over TMD and could not "control" the number of cars which Edwards received from TMD. The express terms of the statute bar any claim by Edwards for the period of TMD's distributorship.

Moreover, it is black letter law that even an intentional tortfeasor is not an "insurer of . . . those whom he has wronged." *Johnson* v. *Green, supra*, 477 F.2d at 101 (5th Cir. 1973). The plaintiff therefore has the burden of proving that the defendant's actions were a substantial factor in causing the plaintiff's damage during the later period. Restatement of Torts, Second, § 433B(1). And a defendant's conduct would not be a "substantial factor" in bringing about the harm if there is a subsequent superceding act.

That is precisely the situation here. The Toyota dealership agreement expressly provided that all prior agreements and vehicle orders were terminated upon a change of distributors.

And, when TMD took over from NET, TMD specifically cancelled each and every dealership agreement then in effect in New England and executed brand new agreements with every single dealer. In other words, there was a complete break with the past and no obligation to continue any policy or practice of NET. Since TMD was free to change the system, Edwards could not sustain any injury by reason of NET's alleged past misdeeds unless TMD independently decided to perpetuate the wrong.

Assuming arguendo that TMD did decide to misallocate vehicles to Edwards, that decision was totally beyond NET's control and had nothing whatever to do with NET. Since NET had no power to prevent the continued misallocation and TMD had the sole power to prevent it, it is self-evident that TMD was the only cause of Edwards' alleged injuries after March 8, 1978 and that NET was no factor at all, let alone a substantial contributing factor.

That NET had nothing to do with Edwards' alleged post-March 1978 injuries is graphically demonstrated by the fact that TMD was well aware of claims that NET had misallocated to Edwards and other dealers, and that TMD did in fact alter some dealers' allocations to compensate for the alleged shortages. Particularly in light of these facts, TMD's alleged refusal to change Edwards' allocation would, if true, constitute an intentional decision by TMD against Edwards and his interests and surely could not be laid on NET's doorstep.

The record evidence is that Edwards and the Toyota dealer alliance repeatedly advised the national Toyota organization that dealers believed NET was misallocating. And Toyota's internal memorandum which gave the reasons for terminating NET's distributorship (PX 330) specifically listed as a reason for termination alleged violations by NET of state and federal dealer protection laws and coercive conduct by NET against its dealers. In the face of this evidence, there is no basis to assume that TMD did not correct any inequities that did exist with regard to Edwards—unless TMD made a conscious decision to disfavor Edwards itself.

And there is no question that TMD did make changes from NET's allocations. Thus, a June 14, 1978 letter from TMD to Union Toyota in Providence, Rhode Island reports Union as having complained of having "received very small allotments . . ." "due to the distribution practices of the previous distributor" (*i.e.*, NET) and awards Union Toyota "a substantial Toyota allotment" based on a request for more cars "and to correct any inequities you may have faced under the previous distributor . . ." And the letter concludes by observing that TMD was prepared to take "necessary corrective actions."

Here, there is undisputed evidence that NET had no power to cause Edwards further injury, and that after March 8, 1978, Edwards' fate was exclusively in the hands of TMD, a third party beyond NET's control. Either there was never any maldistribution to Edwards during the TMD period, or TMD corrected it, as they did with others. If for some reason TMD chose instead to discriminate against Edwards, that was its own doing and not NET's. No reasonable jury could determine that NET was a substantial factor for maldistribution of cars when TMD, and not NET, was making the distribution and when the statute absolves NET. The issue should not have been submitted to the jury. Judgment n.o.v. is the appropriate remedy.

## POINT III

## NET WAS PREJUDICED BY SEVERAL ERRONEOUS RULINGS ON KEY ITEMS OF EVIDENCE

The Court rendered several crucial decisions concerning the admissibility of certain evidence which affected the outcome of this case. Three rulings, in particular, were of key significance. Each of these rulings went against NET and seriously prejudiced NET's ability to mount an effective defense.

### *A. The Court Improperly Excluded Evidence Relating To Sales By Dube And Edwards In January-March 1976*

Edwards' theory of liability assumes that he was entitled to the same number of cars that NET allocated to Dube and that

NET's failure to provide Edwards with an equal number of cars constituted a breach of NET's good-faith obligations under New Hampshire RSA Chapter 357-C. Edwards does not calculate, however, the precise number of cars which he and Dube should have received under NET's formula each month during the period in suit. Rather, Edwards asked the jury to draw the *inference* that because Edwards and Dube received approximately the same number of cars in January, February and March 1976, Edwards should have continued to receive the same number of cars thereafter. Edwards' argument was that in the absence of any cogent reason advanced by NET to explain the differential, the jury could rationally infer that the difference was a result of intentional misconduct by NET, rather than the objective application of a mathematical formula.

In fact, the Court excluded evidence which would have provided the explanation for Dube's higher allocations. The Court refused to permit NET to introduce two exhibits which contradicted Edwards' claim that Edwards sold more cars than Dube in January, February and March 1976. As the excluded evidence demonstrates, Dube outsold Edwards during that three-month period by a significant margin.

The Court excluded this vital evidence on the ground that it had not been provided to Edwards' counsel during discovery. It is undisputed, however, that the evidence was not in NET's possession prior to trial and that therefore NET could not possibly have turned over the evidence during pretrial discovery. The documents were located by Mr. Benson DeWitt, a former NET employee, in his personal file just prior to testifying in this case. There is no possible basis for penalizing NET for not producing evidence which was not within its possession or control, which was not known to NET, and which NET was under no obligation to produce. Even if plaintiff's counsel could make a legitimate argument of unfair surprise, which it cannot, the proper remedy would have been to grant plaintiff a continuance to examine the new evidence, not to exclude highly probative evidence altogether.

The prejudice resulting to NET from this erroneous ruling is obvious. Plaintiff's counsel asked each of NET's key witnesses what possibly could explain the differential between Dube's and Edwards' allocation, based upon the evidence which plaintiff had presented concerning Dube's and Edwards' sales in January, February and March 1976. Based on the evidence which plaintiff had put on the record, they could not offer such an explanation. The witnesses were precluded, however, from considering the most relevant evidence which would have provided the very explanation which the jury was seeking. Once armed with the fact that Dube in fact sold more cars than Edwards during the preceding three months, it is hardly surprising that Dube received more cars than Edwards during the month of April. The fact that the difference in the allocation exceeds the differential in sales, is explained by the fact that Edwards and Dube had different inventory levels (another factor in the mathematical equation). *See* Point IV below. It is thus plain that NET did not tamper with the allocation formula and the jury was deprived of considering evidence which would have proved this fact. Plaintiff is hardly entitled to reap the windfall of a jury verdict of $1.4 million in the face of such compelling contrary evidence.

*B. The Court Improperly Admitted Hearsay Evidence Of A Conversation Between Edwards And An Unidentified TMD Employee*

The Court improperly admitted hearsay evidence of a conversation between Jay Edwards and an unidentified TMD employee to the effect that TMD would not change Edwards' allocation of vehicles because it might offend other dealers. We have previously discussed the erroneous nature of this decision and its prejudicial effect on NET and will not repeat these arguments here.

*C. The Court Improperly Admitted Evidence Relating To Gordon Butler's Conviction For Warranty Fraud*

The Court improperly admitted, over NET's objection, highly inflammatory evidence concerning the warranty fraud

conviction of Gordon Butler. This evidence had absolutely no probative significance to any issue in this case and was designed solely to prejudice the jury against NET's chairman George Butler, who is Gordon Butler's brother. The plaintiff obviously wanted the jury to believe that dishonesty ran in the Butler family and to find against NET on that basis.

The evidence concerning Gordon Butler's warranty fraud conviction was ostensibly offered to show NET's regular policies and practices when it terminated a dealer (*i.e.*, that NET gave terminated dealers specific reasons why that action was being taken). This was at most a tangential issue here since NET ultimately revoked its termination notice to Edwards and Edwards' damage claim was not based on that revoked termination notice. Plaintiff obviously sought to show that NET singled out Edwards for special treatment but it has not explained how NET's termination of Gordon Butler's dealership bears at all on this question. Since there were numerous other instances in the record where NET either terminated or suggested that it might terminate a dealer, the evidence concerning Gordon Butler was, at most, cumulative and unnecessary and, more probably, totally irrelevant. Considering that the termination had nothing to do with Edwards' damage claim for misallocation, it is obvious that the "probative value" of Gordon Butler's warranty fraud conviction "is substantially outweighed by the danger of unfair prejudice" to NET. *See* Fed.R.Evid. 403. A new trial must therefore be granted because of the strong possibility that the jury rendered a verdict based on guilt by association.

## POINT IV

## EVIDENCE EXCLUDED BY THE COURT AND NEWLY DISCOVERED MATHEMATICAL EVIDENCE CONCLUSIVELY DEMONSTRATE THAT EDWARDS RECEIVED HIS PROPER SHARE OF CARS FROM NET

As discussed above, the only sure way to determine whether Edwards received his proper allocation of cars would be to apply to Edwards' actual sales and inventory the mathematical

formula which NET used to allocate vehicles to all dealers. Because the actual sales and inventory figures were not introduced at trial, Edwards relied on the inference that he was shorted cars, rather than on strict mathematical proof which would have been conclusive. The inference which Edwards asked the jury to make was that there was tampering with the mathematical formula because of the fact that Dube and Edwards received approximately the same number of cars in January, February and March 1976 but Dube received more cars beginning in April 1976.

There is now available indisputable, mathematical proof that Edwards did in fact receive the precise number of cars which he was entitled to under the mathematical formula applicable to all dealers. The same evidence indicates Dube likewise received the precise number of cars he was entitled to under the allocation system. The differential between Edwards' and Dube's allocations are conclusively explained by the objective application of this mathematical formula to both of their dealerships. In short, Edwards in fact received what he was entitled to and there was no liability-creating act or omission by NET.

The mathematical evidence which has recently been discovered consists of two items. The first is the sales data uncovered by Mr. DeWitt in his personal file and which was improperly excluded by this court. The second is a computer printout covering all dealers in NET's distributorship region and showing during the crucial month of April 1976 each dealer's sales, inventory levels, and day's supply of vehicles at the time of allocation. As is explained in the accompanying affidavit of Mr. DeWitt, NET allocated Messrs. Dube and Edwards the exact number of cars they were entitled to according to the strict application of the mathematical formula and that NET did not deviate from that equation one iota.

There is ample authority for granting a new trial based upon newly discovered evidence where such a trial is necessary to prevent a manifest injustice. *Ferrell* v. *Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955), is a prime example. In that case the plaintiff alleged that the defendant had failed to pay for goods

sold and delivered. At trial there was no documentary evidence concerning payment and the jury verdict was based upon conflicting testimony. After trial, the defendant obtained copies of the endorsed money-orders demonstrating that payment had been made. The Fifth Circuit held that a new trial was necessary to avoid a manifest injustice, notwithstanding the fact that the evidence could conceivably have been developed earlier and offered at trial:

> "If, in fact, practically conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case, the ends of justice may require granting a new trial even though proper diligence was not used to secure such evidence for the use at trial." *Id.* at 698.

As in *Ferrell*, here too there is now conclusive documentary proof that Edwards was not shorted any cars. It would be a manifest injustice to permit Edwards to recover $1.4 million from NET on the erroneous premise that there was such a shortage. A new trial is therefore required to "prevent a manifest miscarriage of justice."

## CONCLUSION

For the reasons set forth above, the Court should set aside the jury's verdict and enter judgment in favor of NET. In the alternative, the Court should grant a new trial. If the Court does not grant judgment n.o.v. or a new trial, the Court should remit at least all damages attributable to the period subsequent to March 8, 1978 ($949,438) and all damages attributable to Edwards' double-count of damages in this case ($709,731, of which $235,012 is attributable to the period prior to March 8, 1978).

Respectfully submitted,

FRIEDMAN & ATHERTON

By: WILLIAM I. COWIN

*Attorneys for New England Toyota Distributor, Inc.*

*Of Counsel*:

Allen Kezsbom
Steven Glickstein
Aaron Stiefel
Kaye, Scholer, Fierman,
Hays & Handler

CERTIFICATE OF SERVICE

I, William I. Cowin, attorney for the defendant, hereby certify that I have today served the foregoing Defendant's Memorandum in Support of its Motion for Judgment N.O.V. or for a New Trial by causing a copy thereof to be delivered to Daniel A. Laufer, Esq., attorney for the plaintiff, at Myers and Laufer, Four Park Street, Concord, N.H.

WILLIAM I. COWIN
William I. Cowin

Dated: May 13, 1982